entirely the kind specified in the prohibitory clause—a very strong answer indeed. (2) The other observation is the same which I made in the *Carleton* case, viz., that the way in which the entailer speaks about contracting debt in the irritant clause is rather a kind of confession that he forgot to say anything about it in the prohibitory clause. I am therefore clearly of opinion that the defenders can have no aid from the irritant clause.

Next, as to the general words, "nor to do any other act or deed, civil or criminal, or even treasonable, for which the said lands and barony may be anyways adjudged, evicted, or confiscated." It is very clear that no aid can be got here either. The words are not used in connection with the latter part of the prohibitory clause, which deals with the granting of rights or securities, but with reference to the whole of it—the heirs are not to sell, nor to contract debts in the ways specified, nor "to do" so and so. If the words had been used as to contracting debt by securities alone, there might be room for argument, but it is too clear for argument that the general words here do not affect the special ones.

The question comes therefore to turn wholly on the special words of the clause itself, and if these had been to prohibit burdening the lands with infeftments of annual-rent or "with any other right or security," I should have said that the case would raise a very important and probably novel question. But unfortunately for the reclaimer these are not the words, and the prohibition is not against burdening the lands themselves but against granting any deed by which this result is to be effected. Voluntary deeds are alone, in my opinion, referred to. I do not overlook the force of Mr Kinnear's argument that this might as plausibly have been argued in *Arbuthnott's* case as here, but the clause there was directed against contracting "debts or sums of money thereupon by any security whatsoever"—words which might refer to voluntary acts. There is great force in the argument, but at the same time I think the words of the present clause are not against burdening the estate, but against the granting of deeds which shall do this; and so I cannot hold this to be a case where the prohibition is against burdening the lands. This is no doubt very technical, but something depends on the rule as to strict and not liberal interpretation in questions of this sort. On the whole, the only conclusion I can come to upon the authorities is that the acts and deeds prohibited here are voluntary alone.

LORD SHAND—I am also of opinion that the Lord Ordinary's interlocutor is right. The prohibition against contracting debt—one of the cardinal prohibitions—is only valid and effectual if it prohibits two classes of security—first, those voluntarily constituted by deed or other writing of the heir of entail in possession for the purpose of burdening the estate; and secondly, personal debts to which the execution of a deed is not necessary, and which may be made the subject of legal diligence against the estate. It appears to me that this entail is defective in regard to one of these. There is a prohibition of voluntary securities, but none against the contraction of personal debts, which may be made the foundation of legal diligence against the estate. It was contended that the clause of prohibition will cover the contraction of debt, but giving it a fair construction, I do not think it can be construed to that effect. It opens by prohibiting wadsets made by granting deeds directly intended to affect the estate, and it goes on to prohibit the granting of "infeftments of annual-rent or liferent . . . or any other right or security, redeemably or irredeemably, of the lands and barony"—words all of which, in the collocation in which we have them, seem to me to refer to voluntary securities. The entail is therefore, I think, a bad one. It was attempted to build it up by reference to two subsequent clauses—first, to the general words of prohibition at the conclusion of the prohibitory clause, but it has long been settled that such words are restricted, and held to apply only to the class of acts and deeds formerly mentioned, and can not be strained to include others outside that limit. Again, as to the irritant clause, its terms are quite consistent with the liberty of contracting such debts as I have just mentioned, and may be taken to refer only to the opening part of the prohibitory clause—that is, on a sound construction, to the contraction of debt which is to affect the estate by voluntary security. If there be a wider signification of the irritant clause, and it is to be read as intended to cover personal debts, then that clause goes beyond the prohibitory clause, but cannot make the prohibitory clause effectual to a wider extent than its own terms bear.

I agree with your Lordships that this case is not distinguishable from *Cathcart's* case. It is plainly distinguishable from *Arbuthnott* and the other cases in which more comprehensive words were used in the prohibitory clause, which was held therefore to strike at both voluntary and judicial securities, whereas in the present case voluntary securities alone are struck at.

LORD MURE was absent.

The Court adhered.

Counsel for Pursuers (Respondents)—Balfour—J. P. B. Robertson. Agents—Mackenzie & Black, W.S.

Counsel for Defender (Appellant)—Kinnear—Jameson. Agents—Scott-Moncreiff & Wood, W.S.

Tuesday, November 4.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GARDNER OR BOUSTEAD *v.* GARDNER AND PARNIE (GARDNER'S JUDICIAL FACTOR).

Fee and Liferent—Rights of Liferenters—Where Powers of Borrowing and of Sale Reserved.

The purchaser of certain heritable subjects took the titles in favour of himself and his wife and the survivor, whom failing to such trustees as they or he or she should appoint, in trust for behoof of himself and his wife and the survivor for their liferent use only, and for behoof of their children—a son and a daughter—*nominatim* and the survivor in fee, but "declaring that the shares and interests of the said children should be subject always to such further limitations and restrictions and to such appointment as the said spouses or the survivor of them might

direct, appoint, or authorise to be made by any writing under their, his, or her hands." The disposition further conferred upon the disponees a power of sale, and upon the spouses during their joint lives a power to borrow, but in the event of a sale the price was to be re-invested in the purchase of other heritable property, the titles to which were to be taken on the same terms and conditions as in the original disposition. The spouses subsequently executed a mutual trust-disposition and settlement of their whole estate, by which the daughter was to receive a certain small annuity, and the son the rest of the income of the estate, and his children the fee. This trust-disposition made no reference to the powers reserved under the disposition of the heritable property, and there was no other deed professing to be an exercise of them. *Held* that the daughter was entitled to a *pro indiviso* half of the subjects in question, as (1) under the disposition she and her brother were constituted absolute fiars; and as (2) there had been no valid exercise by the spouses of the reserved power of appointment.

Process—Relevancy—Reduction—Fraud.

A daughter sought to reduce certain minutes of agreement between her father and her brother. She averred—"By the effect of the said two minutes of agreement the said Archibald Gardner was ostensibly divested of his whole personal estate, at least of the capital thereof, while receiving in the form of an annuity the profits and income thereof, or of a substantial part of the same. The said minutes of agreement were not *bona fide* absolute transfers *inter vivos* of the deceased Mr Gardner's estate. The transaction was nominal and fictitious, and *in fraudem* of the pursuer's claim of legitim, the object of the minutes being, it is believed, to defeat that claim." *Held* (*dub.* Lord Gifford, and *rev.* Lord Rutherfurd Clark, Ordinary) that this was an insufficient averment of fraud, and reasons of reduction upon that head consequently *repelled.*

In 1857 Archibald Gardner purchased certain heritable property in Glasgow at the price of £5000, taking the titles in the following terms, viz.:—"To and in favour of the said Archibald Gardner and Mrs Janet Robertson or Gardner, his spouse, and the survivor of them, whom failing to such trustees or trustee as might be appointed by any writing under their, his, or her hands, in trust for behoof of them, the said Archibald Gardner and Mrs Janet Robertson or Gardner, and the survivor of them in liferent, for their, his, or her liferent use of the free annual proceeds thereof only during all the days and years of their, his, or her lives, and for behoof of Daniel Gardner and Jessie Gardner, the children of their marriage, equally between them, and the survivor of them in fee; but declaring that in case either of the said Daniel Gardner or Jessie Gardner should decease leaving lawful issue, such issue should succeed always to their respective parent's shares, original or accrescing; that the share, original or accrescing, of the said Jessie Gardner, and the rents and proceeds thereof, should be exclusive always of the *jus mariti* and right of administration of any husband whom she might marry, and not be affectable by her debts or deeds, or by the debts or deeds of such husband, or by the diligence of her or his creditors; and that the shares and interests of the said Daniel Gardner and Jessie Gardner, and of their respective issue, should be subject always to such further limitations and restrictions and to such apportionment as the said Archibald Gardner and Mrs Janet Robertson or Gardner, or the survivor of them, might direct and appoint or authorise to be made by any writing under their, his, or her hands, and to the assignees whomsoever of the said disponees, heritably and irredeemably." The disposition further declared "that the said disponees and their foresaids should have full power and authority at any time to sell and dispose of the said subjects by public roup or private bargain, and to grant, execute, and deliver valid and effectual dispositions and conveyances thereof to the purchasers; and also, so long as both of the said Archibald Gardner and Mrs Janet Robertson or Gardner were in life, but not after the death of either of them, they should have full power and authority to borrow money on the security of the said subjects, and to grant, execute, and deliver valid and effectual bonds and dispositions in security over the same, containing powers of sale and all other usual and necessary clauses, and that as freely, fully, and effectually as if they were absolute and unrestricted proprietors thereof: But it was by the said disposition so produced expressly provided and declared that in case of their said disponees or their foresaids selling or disposing of the said subjects as aforesaid, they should be bound and obliged always to re-invest the prices thereof in the purchase of other heritable property, or on heritable securities, taking the titles thereof always on the terms and in favour of the parties above written; but that purchasers from them, or parties lending money on the security of the said subjects as above provided for, should have no concern or right to interfere with the application of the prices paid or of the money lent."

On the 29th January 1866 Mr and Mrs Gardner executed a mutual trust-disposition and settlement, which was, by codicil dated 30th June 1875, ratified and approved by Mr Gardner, the survivor of the spouses. By this trust-disposition the trusters disponed to certain trustees "All and sundry lands, tenements, and heritages, and also all debts, sums of money, and effects, and in general all estate, heritable and moveable, real and personal, wheresoever situated, now owing and belonging, or that shall be owing and belonging, to each of us at the date of our respective deaths, and of which we, or either of us, by any deed or deeds already executed, or which may hereafter be executed, have power to dispose, with the whole writings, vouchers, and securities, and the rents, interests, profits, and produce of the premises; and we respectively bind and oblige our heirs and successors to grant, execute, and deliver all deeds and writings which may be necessary or proper for vesting in our said trustees the estate and effects above conveyed." The only provision in favour of Jessie Gardner, the trusters' daughter, was in these terms—"In the sixth place, upon the death of the survivor of us, in the first place we direct our trustees and their foresaids to pay to Jessie Robertson

Gardner, our daughter, during all the days and years of her life, a free yearly annuity of £300, payable half-yearly at Whitsunday and Martinmas, and in advance, and beginning the first payment at the first term of Whitsunday or Martinmas after the decease of the survivor of us; but only provided that from and after the death of the survivor of us she lives separate from her husband William Boustead, and has willingly no communication of any kind with him: Declaring that our said trustees, so long as there are trustees acting under this trust, shall be sole judges of the implement or non-implement of the condition on which said annuity is payable, and a minute signed by them or their quorum shall be sufficient evidence of non-implement, and of the said Jessie Robertson Gardner ceasing to have right to said annuity; and in the event of the said Jessie Robertson Gardner not implementing the condition on which said annuity is payable to her, we direct our said trustees and their foresaids to pay to her, for her liferent alimentary use allenarly, a free yearly annuity of £52 per annum, payable weekly and in advance, during all the days and years of her life after the date our said trustees shall fix as the date of non-implement." In regard to the rest of the estate the trustees were directed to pay over the income to the son Daniel Robertson Gardner, and on his death to divide the residue among his children, whom failing to certain other parties, but in no event to the children of the daughter by her husband William Boustead. These children were to have certain small legacies paid to them.

Mrs Gardner died on the 6th May 1874 survived by her husband, who died on the 6th May 1878. In 1866 they had sold a small portion of the Miller Street property, along with other subjects which belonged to Mr Gardner as an individual, to the City of Glasgow Union Railway Company. The price applicable to the portion so sold was not re-invested in heritage. Mr Gardner had previously entered into two minutes of agreement with his son, by the first of which, dated 30th June 1875, the father had conveyed to his son his whole interest in the business of cabinetmaking in which they were partners, on condition that his son should relieve him of the entire liabilities of the business—the father nevertheless to continue a partner, and to be entitled to a share in the profits of not less than £1000 per annum. By the second minute the father entirely ceased to be a partner, and his son undertook to pay him an annuity of £1000.

The present action was raised by Mr and Mrs Boustead against her brother Daniel Robertson Gardner, and also against Mr Parnie, who had been appointed judicial factor on the trust-estate falling under the mutual disposition and settlement by Mr and Mrs Gardner. The action concluded for (1) declarator that Mrs Boustead was entitled to one-half *pro indiviso* of the Miller Street subjects disponed by the deed of 1857; (2) declarator that she was entitled to legitim; and (3) reduction of the two minutes of agreement between her father and brother relative to their business.

The following were the averments of the pursuers with reference to the reductive conclusion:—"(Cond 6) Mr Gardner and the defender, his son, carried on business in partnership as cabinetmakers in Glasgow for many years, and large profits, it is believed, were earned. Shortly before his death Mr Gardner nominally retired from business. In particular, by minute of agreement between himself and his said son, the defender, dated 30th June 1875, the deceased Mr Gardner assigned and conveyed to his son his whole interest in the stock, accumulated profits, and other assets of the concern of A. Gardner & Son, on condition that the second party, his said son, should relieve the first party of the whole debts and liabilities, present and future, of the said business, and of any business in which he might become a partner with the second party; but that the first party should notwithstanding remain a partner with A. Gardner & Son, and of any extension of the business thereof, and should be entitled as such to a share of the profits, and which profits the second party guaranteed should not be less than £1000 per annum. Reference is made to the minute for its terms and conditions. (Cond. 7) By another minute of agreement between the same parties, dated 22d November 1876, it was agreed that the deceased Mr Gardner should cease to be a partner as on 22d November of that year, and the defender Daniel Robertson Gardner thereby bound and obliged himself to free and relieve his father of the whole debts and obligations of the firm, and to pay him an annuity of £1000 per annum, half-yearly, during the lifetime of the said Archibald Gardner. (Cond. 8) By the effect of the said two minutes of agreement the said Archibald Gardner was ostensibly divested of his whole personal estate, at least of the capital thereof, while receiving in the form of an annuity the profits and income thereof, or of a substantial part of the same. The said minutes of agreement were not *bona fide* absolute transfers *inter vivos* of the deceased Mr Gardner's estate. The transaction was nominal and fictitious, and *in fraudem* of the pursuer's claim of legitim, the object of the minutes being, it is believed, to defeat that claim. It is averred that the property made over by the father to the son under these deeds, and of which he retained the life interest or profits, was of the value of £40,000. One-fourth of this sum is claimed by the said pursuer as her share of legitim."

The pursuer pleaded—"(1) On a sound construction of the disposition of 1857, and sasine thereon, the pursuer Mrs Boustead has a beneficiary interest to the extent of one-half *pro indiviso* in the fee of the subjects thereby conveyed. (2) The pursuers are entitled to recover Mrs Boustead's share of the rents of said subjects which have accrued since her father's death from the defenders, or such of them as have intromitted therewith. (2) The pursuer Mrs Boustead is entitled, as a child of the deceased Archibald Gardner, to one-fourth of his moveable estate in name of legitim. (4) The pretended minutes of agreement are reducible in so far as they effect or purport to effect a transfer of the deceased's whole moveable estate to his son, in respect that under said transfer the deceased's life interest in his estate, or a substantial part thereof, was reserved; and that for this and other reasons the said agreements cannot operate to the prejudice of a child claiming legitim. (5) The defenders being indebted and resting-owing in the sums concluded for, the pursuers are entitled to decree of payment and to expenses."

The defender Gardner pleaded—"(1) The averments of the pursuers, so far as directed

against the present defender, are irrelevant and insufficient to support the conclusions of the summons. (2) The deeds sought to be reduced being valid and effectual, and the pursuers having no interest in the assets of the said business, the defender is not bound to count and reckon with the pursuers for his intromissions therewith. (3) The defender having been always willing to count and reckon for the sums remaining in his hands due or belonging to the deceased as above set forth, the action, so far as directed against him, is unnecessary and should be dismissed. (4) Upon a sound construction of the titles to the said heritable property and of the said mutual settlement, the said property falls to be dealt with as part of the trust-estate of the spouses, and the proceeds applied in terms of the said mutual settlement."

The defender Parnie pleaded that as he was ready to count and reckon with the pursuer as soon as her rights were ascertained, he ought to be assoilzied.

On 6th June 1879 the Lord Ordinary (Rutherfurd Clark) pronounced this interlocutor:—"Finds, declares, and decerns in terms of the declaratory conclusions of the libel: Finds the pursuers entitled to legitim, and before further answer allows the pursuers a proof of the averments contained in the eighth article of the condescendence, and to the defenders a conjunct probation: Meantime reserves all questions of expenses.

"*Note.*—In 1857 Archibald Gardner, the father of the pursuer Mrs Boustead, purchased certain heritable property in Glasgow at the price of £5000. He took the title in favour of himself and his wife and the survivor, whom failing to such trustees as they or he or she should appoint, in trust for behoof of himself and his wife and the survivor, for their liferent use only, and for behoof of their children Daniel and Jessie Gardner and the survivor in fee, but declaring 'that the shares and interests of the said Daniel Gardner and Jessie Gardner, and of their respective issue, should be subject always to such further limitations and restrictions and to such appointment as the said Archibald Gardner and Mrs Janet Robertson or Gardner, or the survivor of them, might direct and appoint or authorise to be made by any writing under their, his, or her hands.' The deed further declares that the disponees should have a full power of sale, and during their joint lives a full power to borrow, but under the provision 'that in case of their said disponees or their foresaids selling or disposing of the said subjects as aforesaid they should be bound and obliged always to re-invest the prices thereof in the purchase of other heritable property, or on heritable securities, taking the titles thereof always on the terms and in favour of the parties above written.' In 1866 a small portion of the subjects was sold to the Union Railway Company, but the power to borrow was not exercised. In 1866 Mr and Mrs Gardner executed a mutual trust-deed by which they disposed of their whole estate. The deed does not *per expressum* convey the subjects already mentioned, nor does it profess to exercise the powers which were reserved to the spouses. Indeed it makes no reference to them. The benefit which the pursuer Mrs Boustead (Jessie Gardner) receives under this deed is an annuity of £300 provided she lives separately from and has no communication with her husband; but if this condition is not implemented she is to receive an alimentary annuity of £52. The rest of the income is bequeathed to Daniel Gardner. The residue is given to the children of Daniel, subject to certain small provisions in favour of Mrs Boustead's children by her present marriage, and to somewhat larger provisions in favour of her children by any other marriage into which she may enter with the approval of her brother.

"The pursuer Mrs Boustead has raised this action, in which she claims—1st, A *pro indiviso* half of the subjects acquired in 1857, including one-half of the price of the part which had been sold; and 2d, her legitim. It is not doubted that she is entitled to claim legitim, though the parties are at variance both as to the conditions on which this claim may be made and as to the amount of legitim fund.

"1. The defenders maintain that the heritable subjects in question belonged to Mr Gardner, or at least to Mr and Mrs Gardner. They do not dispute that the conveyance is taken to Mr and Mrs Gardner in trust; but they contend that a liferent with an unqualified power to borrow is equivalent to a fee. The Lord Ordinary is not able to adopt that view. It is true that a liferent coupled with an absolute power of disposal has been construed into a fee; but in this case no such power exists. For on a sale there is an obligation to invest the price in the purchase of lands or on heritable securities, the titles to which shall be taken in the same terms as the title of 1857. It is true that no similar condition is expressed if the power to borrow is exercised. But even if that power be assumed to be unqualified, it cannot be held that the liferenters have an absolute *jus disponendi*, and therefore they cannot have a fee. The Lord Ordinary is therefore of opinion that the fee was vested in Daniel and Jessie Gardner *pro indiviso*, subject to the exercise of the powers which were reserved to Mr and Mrs Gardner or the survivor.

"2. But the defenders urged that the mutual trust-deed of 1866 operated as an exercise of the power reserved under the title of 1857. In order to give effect to this argument, it must be shown (1) that it was intended to exercise the power, and (2) that the alleged exercise of it was legal. (1) The trust-deed does not profess to convey or to deal with the subjects in question, or to be an exercise of the reserved power, nor is it necessary in order to satisfy the purposes of the deed to put upon it any such construction. It is not said that the trusters had no heritable estate other than these subjects, and indeed it appears that they had. Nor is it possible to define what interest is assigned to the objects of the power by the alleged exercise of it. Indeed, it cannot be said that the pursuer Mrs Boustead obtains any share of the subjects in question, because the trust-deed gives her nothing but a specific annuity, no part of which need be paid out of the income of the subjects of which she is joint fiar. (2) But the effect of holding the trust-deed to be an exercise of the power would be (1st) to reduce the interest of the joint fiars to a liferent merely; (2d) to exclude the pursuer's claim of legitim, unless she chose to surrender her rights under the disposition of 1857; and (3d) to confer the fee on persons who are not objects of the power.

Further, it is necessary to hold that it was lawful for the trusters to attach a condition by which the benefit of the pursuer would be diminished if she did not separate from her husband.

"The Lord Ordinary is disposed to hold that Mr and Mrs Gardner did not possess the power of restricting the interest of Mrs Boustead to a liferent only. She and her brother were fiars, and the reserved power, although it authorises the parents to apportion the fee as they may think proper, and to fix the conditions under which it is to be enjoyed, does not, as it seems to the Lord Ordinary, enable the parents to alter the nature of the right which was vested in their children. But further, he conceives that it cannot in any view authorise them to give any interest to persons who were not objects of the power. At the best, it is a power to apportion or divide the whole estate between the fiars, but not to introduce new persons into the disposition. And even if it were lawful to limit the interest of Mrs Boustead to a liferent, the effect would be that the fee of the whole would pass to her brother.

"Again, it appears to the Lord Ordinary that the power could not be so exercised as to force the pursuer to surrender her legitim. She had two rights—the one under the disposition of 1857, and the other to legitim; and she is entitled to both. Her father could not by an exercise of the reserved power deprive her of one of them. But this is the necessary consequence of holding that the trust-deed is an exercise of the power.

"Holding these views, the Lord Ordinary does not think it necessary to consider the effect of the condition which is intended to separate Mrs Boustead from her husband.

"3. The pursuer is entitled to legitim. That is not disputed; but the amount of the fund is in dispute. The pursuer maintains that the deed mentioned in the 6th and 7th articles of the condescendence were not intended to express real transactions, and that Mr Gardner remained the true owner of the estate to which they relate. So the pursuer explains the eighth article of the condescendence, and the Lord Ordinary thinks that this is the true reading of it. Hence an inquiry is necessary."

The defender Gardner reclaimed, and argued —(1) A liferenter by reservation with a power of disposal was equal to a fiar. What the power of disposal was did not matter. Here it was an unlimited power to borrow. (2) Admitting the children were fiars, Mr and Mrs Gardner by their deed of 1866 intended to exercise the power of appointment, and actually did exercise it. It was not necessary that the power or the subject of it should be expressly mentioned. (3) The averments on record were not sufficiently explicit to support the reductive conclusion. The pursuers ought to set forth what secret agreement between the father and the son they proposed to prove.

Authorities—*Baillie* v. *Clark*, Feb. 23, 1809, F.C.; *Smith* v. *Milne*, June 6, 1826, 4 S. 685; *Hislop* v. *Maxwell's Trustees*, Feb. 11, 1834, 12 S. 413; *Morris* v. *Tennant*, July 6, 1855, 17 Scot. Jur. 546

The respondent relied on the grounds stated in the note of the Lord Ordinary.

At advising—

Lord Justice-Clerk—The Lord Ordinary has expressed his views on the two first points very distinctly and at some length, and although the argument was weighty and important, I see no reason to suppose that his judgment is not well founded.

On the first question I cannot find any ground for holding that the fee of the Miller Street subjects was in the parents. The subjects were purchased by Mr Gardner, and the title was taken to himself and his wife, and the survivor of them, as trustees for themselves in liferent and their children in fee. Infeftment was taken, and I cannot doubt that the fee was finally and conclusively vested in the children subject to the other provisions of the deed.

The disposition contained a power of sale, but the spouses, or the trustees who under the deed may come in their place, are taken bound in the event of a sale to re-invest the price in the same terms, so that that goes for nothing. There is also a power to borrow, but so far as I know a power to borrow has never been held to confer a fee on a liferenter. There is no such case in our books. On the contrary, I find from Lord St Leonard's book on Powers that such a power, either absolute or limited, is a proper and legitimate qualification of a liferent interest. But in this instance the power was never exercised—so that it also goes for nothing. I therefore see no reason to differ from the Lord Ordinary on the first question. The exercise of the power might have diminished the value of the subjects to the fiars, but it was never exercised.

The second question is, Whether there was a valid exercise of the power of appointment? I think that what was done was not a valid exercise, because other parties have been introduced who are not the objects of the appointment, with the result of there being a partial appointment only—that is to say, it is not an exercise of the power at all. In point of fact, I think these spouses had forgotten that they had a power of appointment, or that the subjects were vested in them as trustees for their children, and in consequence I do not think they intended to exercise the power. Neither in their division of the property do the spouses refer to the terms of the disposition of the subjects, nor is any reference made to the subjects themselves. I do not think it necessary to go into the authorities on the point. The case of *Morris* seems to me conclusive.

In regard to the third question, I am of opinion that there is no relevant allegation on record which can support the reductive conclusions of the summons. The agreements attempted to be set aside seem to me to embody a very reasonable arrangement between a father and a son who had been carrying on business together; and whether it does or does not interfere with the legitim fund is of no consequence provided it was really carried out. It is therefore necessary that there should be a precise statement of the facts which are to be made the ground of reduction. But the only statement we have on the subject is in condescendence 8, which is in these terms—[*His Lordship here quoted the condescendence ut supra*]. Now, if that only means that the object of the minute of agreement was to divest the father so as to defeat the claim to legitim, it is perfectly irrelevant. But it is said that it means that there was another—a verbal—contract between the father and the son that no real

change was to take place in their business relations, and that the son was merely to be the hand to carry the profits of the business to the father. But the pursuer's counsel declined to say that that was what he would prove when we put the question to him; and I can see no reason for a statement being amended which has not been made more in good faith. The worst of statements of this sort when made at random is that they are themselves frauds, and of the worst kind. A man has no right to make allegations of fraud on chance in the hope that something may turn up in the course of the case to justify what he has said. I do not think that is a style of pleading which should be encouraged. I am therefore of opinion that the statement has not a shadow of relevancy, and that there is no reason for not finding it irrelevant and repelling the reasons of reduction.

Lord Gifford—On the two first questions I entirely concur with your Lordships and the Lord Ordinary.

I think on the face of the deed of 1857 no fee was created in the parents, but in the children, and in the children *nominatim.* The deed is very peculiarly expressed, and does not reflect much credit on the conveyancer who prepared it. The dispositive clause, however, plainly sets forth a conveyance in trust for the spouses in liferent allenarly and their two children *nominatim* in fee; and the question then arises, whether there is any clause which takes the fee out of these children, in which they stood infeft through their trustees? There is a provision that the children's shares and interests should be "subject always to such further limitations and restrictions and to such appointment" as the spouses or their survivor may direct. I do not think that the power of appointment, if it had stood alone, would have taken the fee out of the children, but it is said that the addition of "such further limitations and restrictions" does so. I think "limitations and restrictions" are used in this deed in a very narrow sense. The only restriction in the earlier part of the deed, on the fee, is that it is restrained from the diligence of creditors of the daughter's husband, and that is rather in her favour than against her. Any "further restriction or limitation" must, I think, be of the same kind with that I have specified. I do not think therefore tha tthis reserved power has any effect in taking away the fee.

This disposition further provides that "the disponees shall have full power to sell the subjects at any time." But who are the disponees? They are the trustees. The power of sale seems to me therefore to be a mere power of administration given to the trustees. Accordingly we find a provision that if the subjects are sold the price is to be re-invested in similar terms. Then there is a power to borrow given, not to the "disponees"—that is, the trustees as a continuing body—but to the spouses while they are both alive. That can be explained by saying that it is to meet a case of actual distress when they really needed to exercise the power, because they had come to be in want.

I have come to the conclusion that the purchase of this property was to make a family settlement upon the wife and children because there was no antenuptial contract. On these grounds I hold that the fee of those subjects is in the children of the marriage.

There remains the other question as to whether the spouses exercised their power of appointment by means of the joint settlement which they executed? I do not think they did. There is nothing to point at the Miller Street subjects being dealt with in that deed. A new trust was thereby created, and yet there is no special conveyance of these subjects. On both questions of law therefore I agree with your Lordship and the Lord Ordinary.

That leaves only the question as to the amendment of the record. I agree with your Lordship that there is not much averment, but my sympathy is with the Lord Ordinary when he says "the pursuer maintains that the deeds mentioned in the sixth and seventh articles of the condescendence were not intended to express real transactions, and that Mr Gardner remained the true owner of the estate to which they relate. So the pursuer explains the eighth article of the condescendence, and the Lord Ordinary thinks that this is the true reading of it." I admit that this is a bare averment, but if the reading of the averment be that which the pursuer puts upon it, I can hardly doubt the relevancy. It is not a detailed statement certainly, but I think there is enough averment for a record.

Lord Young—(who had been called in in the absence of Lord Ormidale)—With respect to the declaratory conclusions I concur.

The reductive conclusions relate to two minutes of agreement between Mr Gardner senior and his son, dated in 1875 and 1876; and the reasons of reduction are set forth in condescendence eight, and I think that there is no other part of the condescendence applicable to them.

Now, these minutes of agreement between the father and the son purported to hand over the business from the father, who was a man up in years, to the son, who had for some time been carrying on his business in partnership with his father, upon conditions that the son, while taking over the whole capital of the concern, was to become liable in all the debts and was to pay his father £1000 a-year. Now, there is nothing more legal, more natural, and, speaking generally, more proper than such an agreement as this between a father and a son who have been carrying on business together. To wind up the business would be a most unwise proceeding, and it is according to all reasonable practice to make an arrangement beforehand, usually very much of the character of the one here.

Now, this arrangement is made the subject of reduction, and we are put to consider the reasons of reduction. They are these—[*His Lordship read condescendence eight ut supra*].

The pursuer therefore says that this to all appearance reasonable transaction was nominal and fictitious, being intended to defeat the pursuer's claim to legitim. Nominal and fictitious—why? It was suggested that this averment should be set forth with some reference to the facts on which the pursuer intended to found. I asked what they thought they could prove—whether they were not guessing that something might turn up? The answer was that the case had not gone far enough. Well, it is at a pretty advanced stage now, and a party who is making what is substan-

tially an averment of forgery ought by this time to know something of the facts upon which he intends to found in his proof of such a charge. It is somewhat strange that there should have been no inquiry. For if a false deed is made with the intent to defraud, that answers to the very definition of forgery. It makes no difference that the signatures are genuine. Deeds with genuine signatures have been punished as forgeries. For example, a lease signed by a landlord and a tenant, where there is no real lease, but where it is intended to deceive a purchaser, has been held to be forgery, and punished accordingly. Now, here the pursuer apparently means to aver that there was a conspiracy to defraud the sister by deeds which had an appearance but no reality. Now, I cannot spell that out of the words nominal and fictitious. And I am the more encouraged to concur with your Lordships, because when the question was asked—"What do you mean to prove—what are the facts or events you mean to put in evidence?" the answer was—"That is premature. If you give us time we shall be able to answer." There is a maxim *fraus latet in generalibus*. There is fraud in the very generality of the statements that have been put before us.

I concur therefore with your Lordships and the Lord Ordinary in regard to the declaratory conclusions, and with your Lordships in repelling the reductive conclusions.

The Court pronounced this interlocutor:—

"Adhere as regards the declaratory conclusions: Recal the interlocutor reclaimed against as regards the reasons of reduction, and repel the reasons of reduction; and remit to the Lord Ordinary to proceed with the cause, with power to decide all questions of expenses."

Counsel for Defender (Reclaimer)—Asher—Mackintosh. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Pursuers (Respondents)—M'Laren—Lorimer. Agents—Macbrair & Keith, S.S.C.

Counsel for Parnie (Judicial Factor)—Jameson. Agents—J. & J. Ross, W.S.

Wednesday, November 5.

SECOND DIVISION.

[Sheriff of Lanarkshire.

RUSSELL AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Level-Crossing—Injury—Fault—Contributory Negligence.

Circumstances in which a railway company were found *liable* in damages where a person making use of a level-crossing road was killed by a passing engine belonging to the company.

John Russell, miner at the Merryton Colliery, was killed on the Lesmahagow branch of the Caledonian Railway on 6th November 1878, and his wife and children thereafter raised this action for damages against the railway company, who pleaded that they were not in fault, and that Russell was guilty of contributory negligence.

The Merryton Colliery is on the north side of the Lesmahagow Railway, and the deceased resided on the south side. The nearest way to the colliery from the south side of the railway was by a side road leading from the high road, and crossing the railway, which was double-lined, by a level-crossing. On the left side of the road there was a fence formed of sleepers set on end, and on each side of the railway there was a gate. There was no bridge. Close to the crossing there was a pointsman's house, from which the gates were opened and shut when horses, carts, and machines required to cross. There was also a ladder to enable foot-passengers to cross the fence.

About six o'clock on the morning of the day in question Russell and a companion named Robertson were going to their work at the colliery, and as usual they made use of the level-crossing, but while in the act of going across a passing engine came up and killed Russell. Robertson reached the other side in safety.

It was, *inter alia*, averred by the defenders—"When the deceased came to the crossing the engine with empty waggons was in course of shunting on to the down-line of rails (or the west-most line of rails), and pushing the waggons, the engine being reversed. From this the deceased ought to have known that the engine which was in course of going to Stonehouse for the passenger waggons was coming up. An engine had passed that crossing at the same hour in the morning for a long time prior to the accident, and this was well known to deceased and other workmen."

The leading features of the proof will be found in the following note to the interlocutor of the Sheriff-Substitute (Birnie), who found for the pursuers, awarding £400 damages.

"*Note.*—The defenders are proprietors of the Hamilton and Lesmahagow Railway. There is a level-crossing to the Merryton pit, which is on the north side of the railway. A branch road leads to the crossing from the public road on the south of the railway, with a fence formed of sleepers set on end on the left side. There is a high pointsman's box within the railway fence, also on the left side. There are gates at the crossing, opened from the pointsman's box, with steps for foot-passengers. There is a slight curve to the north on the line towards Hamilton. The home signal is nearly opposite the pointsman's box. It is not disputed that the deceased was entitled to use the crossing.

"On the morning of 6th November last, about six o'clock, an upgoing train of empty waggons had been shunted, and was standing on the down or south rails at the level-crossing. The engine of the train was blowing off steam. The morning was calm and clear, but dark.

"As the deceased was crossing to his work he was run over and killed by an engine on the up-rails going towards Lesmahagow.

"The pursuers are his widow and children, and sue for damages. The defenders deny fault, and plead contributory negligence.

"1st. The cases of *Grant* v. *Caledonian Railway Company*, 10th December 1870, 9 Macph. 258, and *Thomson* v. *North British Railway*